A **NOORFADILLA AHMAD SAIKIN**

v.

CHAYED BASIRUN & ORS

B HIGH COURT MALAYA, SHAH ALAM
ZALEHA YUSOF J
[ORIGINATING SUMMONS NO: 21-248-2010]
12 JULY 2011

C ***CIVIL PROCEDURE:*** *Locus standi - Declaratory relief - Plaintiff sought to assert rights to legal status - Whether declaration proper form of relief - Whether in line with s. 41 of the Specific Relief Act 1950*

D ***CONSTITUTIONAL LAW:*** *Fundamental liberties - Equality before the law - Revocation of appointment on grounds of pregnancy - Whether amounted to gender discrimination - Definition of 'equality' - Whether court could refer to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) - Whether principle of reasonable classification applicable*

E ***CONSTITUTIONAL LAW:*** *Interpretation - Equality - Revocation of appointment on grounds of pregnancy - Whether in contravention of plaintiff's rights - Whether defendants acted in violation of art. 8(2) of the Federal Constitution - Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*

F

The plaintiff's complaint was that the 'Guru Sandaran Tidak Terlatih' (GSTT) post offered to her was revoked and withdrawn by the defendants on the sole ground that the plaintiff was pregnant. The main issue for the court's determination was
G whether the action/directive of the defendants was gender discrimination in violation of art. 8(2) of the Federal Constitution (Constitution). The defendants, on the other hand, raised the issues of the plaintiff's *locus standi* to bring this action and whether declaration was a proper remedy. The court, in determining the
H issue raised by the plaintiff, had to consider whether it could refer to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on clarifying the term 'equality' and gender discrimination under art. 8(2) of the Constitution.

I

Held (allowing the application with no order as to costs):

(1) The word 'gender' was incorporated into art. 8(2) of the Constitution in order to comply with Malaysia's obligation under CEDAW in order to reflect the view that women are not discriminated. In interpreting art. 8(2) of the Constitution, it is the court's duty to take into account the government's commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The courts have to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art. 8(2) of the Constitution. (paras 21, 30)

(2) Applying arts. 1 and 11 of the CEDAW, pregnancy in this case was a form of gender discrimination. The plaintiff should have been entitled to be employed as a GSTT even if she was pregnant. Further, the plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination. (para

(3) The principle of reasonable classification is only applicable to art. 8(1) and not to art. 8(2) of the Constitution. Hence, the defendants' argument that it is justified to discriminate pregnant women applying the principle was not sustainable. (para 39)

(4) The court should not be involved in the policy decision of the government. However, in the present case, the argument of policy consideration was an afterthought, as, if it was that important, it should have been incorporated into the Circular or raised during interview. (para 40)

(5) The contract for GSTT was a month-to-month contract and it could be terminated at any time. Even after one month of working, there is no guarantee that the person will stay even if she is not pregnant. As such there was no merit in the argument put forward by the defendants that employing a pregnant woman to fill up the post would defeat the purpose of GSTT to solve the problem of shortage of teachers in Malaysia. Further, the provision in the Circular supported the argument that a pregnant woman can be engaged for GSTT. The Circular did not specifically prohibit a pregnant woman from applying to the post. It merely states that a GSTT was not entitled to maternity leave. (paras 41 & 42)

(6) By virtue of art. 160 of the Constitution, the defendants are public authorities and therefore agents of the Executive. In the circumstances, the defendants' act of revoking and withdrawing the placement memo because the plaintiff was pregnant constituted a violation of art. 8(2) of the Federal Constitution. It was in contravention of the plaintiff's rights by the defendants as agents of the Executive. *(Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*; foll). (para 44)

(7) The issue of the plaintiff's *locus standi* was not relevant in the instant case as the plaintiff was claiming that her right to be employed had been affected by the defendants' decision which was contrary to art. 8(2) of the Constitution. The plaintiff sought to assert her right to legal status which was in line with s. 41 of the Specific Relief Act 1950 (SRA). Hence, declaration was a proper form of relief as the plaintiff, further to the declaratory orders, was also seeking for damages and therefore satisfied the proviso to s. 41 of the SRA. (para 15)

Case(s) referred to:

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(foll)***

Brooks v. Canada Safeway Ltd [1989] 59 DLR (4th) 321 ***(refd)***

CCSU v. Minister of Civil Service [1994] 3 All ER 935 ***(refd)***

Chu Kheng Lim v. Minister for Immigration [1992] 176 CLR 1 ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Lamb v. Cotogno [1987] 164 CLR 1 ***(refd)***

Minister for Immigration and Ethnic Affairs v. Teoh [1995] 128 ALR 353 ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

PP v. Datuk Harun Haji Idris & Ors [1976] 1 LNS 180 HC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Teh Guan Teik v. Inspector-General of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***

Vishaka v. State of Rajasthan AIR [1997] SC 3011 ***(refd)***

YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8(1), (2), 160
Specific Relief Act 1950, s. 41

For the plaintiff - Edmund Bon Tai Soon (Honey Tan Lay Eau & PDK Chan Yen Hui with him); M/s Chooi & Co
For the defendants - Aida Adhha Abu Bakar SFC

Reported by S Barathi

JUDGMENT

Zaleha Yusof J:

[1] Enclosure (1) of this originating summons is the plaintiff's application for *inter alia*, the following declarations:

(i) that with regard to the legal rights, status and character of a pregnant woman, namely the plaintiff (as of 12 January 2009), that the plaintiff was qualified and entitled to be appointed a "Guru Sandaran Tidak Terlatih" (GSTT);

(ii) that the action of the defendants on 12 January 2009 to withdraw and/or cancel the plaintiff's appointment as a GSTT is unconstitutional, unlawful and void.

Facts

[2] The 1st and 2nd defendants were at the material time Education Officers of the Education Office of the Hulu Langat District (PP DHL), in charge of employing persons interested in the GSTT position for the Hulu Langat District. The 3rd defendant was then the State Director of the Education Department of Selangor. The Ministry of Education (the Ministry) tried to overcome the problem of shortage of teachers in Malaysia by employing untrained teachers, also known as GSTT. The Ministry had previously issued a letter of approval (also known as a warrant) to all State Directors of Education, authorizing them to elect and employ GSST. The letter of approval/warrant states that the employment of GSST is subject to the terms of "Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil 1/2007" dated 27 February 2007 (the circular). The circular states *inter alia*, as follows:

A **3 Taraf GST And GSTT**

3.1 GST dan GSTT adalah bertaraf bukan kakitangan kerajaan. Oleh yang demikian mereka tidak layak mendapat apa jua faedah atau kemudahan seperti yang diterima oleh guru-guru tetap kecuali kemudahan-kemudahan seperti yang tersebut di perenggan 4 di bawah.

4. Elaun dan Kemudahan yang layak diterima oleh GST dan GSTT

C …

4.1.1. Elaun bulanan berdasarkan tangga elaun yang diluluskan oleh Jawatankuasa Kabinet Gaji dan telah dilaksanakan melalui ...

D 4.2. Kemudahan-Kemudahan yang tidak layak diperolehi oleh GST dan GSTT

…

4.2.2. Cuti Bersalin

E …

6. Tempoh Perkhidmatan Guru-Guru Sandaran

…

F 6.2. Perkhidmatan GSST adalah juga berdasarkan sebulan ke sebulan dan akan tamat pada 31 Disember tahun berkenaan atau ditamatkan pada bila-bila masa apabila perkhidmatan mereka tidak dikehendaki lagi oleh Jabatan Pelajaran Negeri/Jabatan/Bahagian berkenaan mengikut

G yang mana lebih berkaitan dengan kepentingan perkhidmatan.

[3] It is clear from the above that the employment of a GSTT is temporary in nature, on a month to month basis and a GSTT

H is paid a monthly allowance and may resign at any time.

[4] The plaintiff had applied to PPDHL to be employed as a GSTT. The plaintiff had received a call requesting her to attend an interview at PPDHL on 2 January 2009. On the day the plaintiff attended the interview she was asked to fill up certain

I forms before the interview. During the interview, questions posed to the plaintiff included questions pertaining to her general knowledge, personal details, problem solving skills and residential

address. Before and during the said interview, the plaintiff was not asked whether she was pregnant or not. On 11 January 2009, the plaintiff received a text message from a PPDHL officer. The text message is reproduced as follows:

> As'kum wbt ... Berhubung permohonan GSTT, tuan/puan cik diminta hadir ke Blok B, Pejabat Pelajaran Daerah Hulu Langat pada hari Isnin 12 Januari 08 mulai dari pukul 8.00 pagi hingga 9.00 pagi untuk mendapatkan Memo Penempatan ke sekolah-sekolah. Sila berpakaian sesuai untuk ke sekolah. Walaubagaimanapun, bagi yang ada kelapangan pada hari ini, boleh juga berbuat demikian mulai dari pukul 11.00 pagi hingga 4.30 petang.
>
> Tahniah dan terima kasih.

[5] On 12 January 2009 at 8am, the plaintiff was present at PPDHL as instructed. The plaintiff was given a "Memo Penempatan" (Placement Memo) where it was stated that the plaintiff will be posted to "Sekolah Menengah Kebangsaan Tinggi Kajang". It is pertinent to note that the date the plaintiff was to have reported to the said school had passed, ie, 5 January 2009. This means that as of 12 January 2009, there was still a need for the plaintiff to fill the vacancy.

[6] The plaintiff and a few others were then given a briefing on the terms of service of employment such as the requirement to give one month's notice for resignation. The plaintiff was also asked to report for duty immediately.

[7] Subsequently, a PPDHL officer asked if anyone was pregnant. The plaintiff and two others admitted that they were pregnant. (The plaintiff at that time was three months pregnant). The officer then withdrew the Placement Memo of the plaintiff.

[8] Later, the plaintiff, through her husband wrote a number of e-mails to the Ministry requesting for an explanation. On 17 February 2010 the Ministry, ie, on behalf of the 4th and 5th defendants replied. The Ministry relied on the circular to say that a pregnant woman cannot be employed to the GSTT post because:

(i) The period between the time of delivery to full health is too long (two months).

(ii) A pregnant woman as a GSTT may not frequently be able to attend to her job due to various health reasons.

(iii) When she gives birth she needs to be replaced by a new teacher who will require further briefings.

(iv) A GSTT post cannot be filled with "replacement" teachers.

[9] The Ministry added that the purpose of employing a GSTT is to help overcome the shortage of teachers and not to add to the problem.

[10] On 19 February 2009, the plaintiff through her solicitors wrote a letter to the defendants demanding that her employment as GSTT be restored immediately. There was no written reply to this letter until today.

[11] Despite attempts, the parties have not been able to resolve this dispute.

[12] On 7 May 2010 the plaintiff filed this originating summons against the defendants.

Issue

[13] The main issue here is whether the action/directive of the defendants in refusing to allow pregnant women to be employed as GSTT is gender discrimination in violation of art. 8(2) of the Federal Constitution.

[14] There are, however, other issues which have been raised by the defendants in their further submission ie, on the locus of the plaintiff to bring this action and on whether declaration is a proper remedy. I feel these other issues can be dealt with together before I deal with the main issue.

Opinion

[15] It is the defendants' contention that there is no binding contract between the parties; therefore the plaintiff has not acquired a legal right as against the defendants to grant her the *locus standi* to make this application. To me, I agree with the plaintiff's argument that whether there is a binding contract or not is not relevant as in the instant case, the plaintiff is claiming that her right to be employed has been affected by the defendants' decision which the plaintiff claims to be contrary to art. 8(2) of the Federal Constitution. So, it is clear that what the plaintiff is seeking is to assert her right to a legal status which is in line with s. 41 of the Specific Relief Act 1950 (Act 137). Hence,

declaration is a proper form of relief. Refer to the Supreme Court's decision in *Teh Guan Teik v. Inspector-General of Police & Anor* [1998] 3 CLJ 153 and the Federal Court's decision in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253.

[16] Section 41 of Act 137 however provides that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration, omits to do so. If we look at encl. (1), the plaintiff is not only seeking for declaratory orders but also for damages. As such to me, it is dear that the plaintiff has also satisfied the proviso of s. 41 of Act 137.

[17] I must state that at this stage, I have not given a decision as to whether to grant the order sought by the plaintiff yet. All I am saying is that a declaration is a proper remedy for this sort of cases.

[18] Now back to the main issue; art. 8(2) of the Federal Constitution provides *inter alia*, that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. The word "gender" was added to art. 8(2) by the Constitution (Amendment) (No. 2) Act 2001 (Act A 1130), which came into force on 28 September 2001; to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This is clearly illustrated in the Minister's speech in the Hansard for 2nd and 3rd Reading of the Bill to amend the Constitution on 1 August 2001 at p. 69 as follows:

> (Datuk Seri Utama Dr. Rais bin Yatim): Tuan Yang Di-Pertua, Yang Berhormat bagi Kepong, saya suka menyatakan telah mengambil dua aspek penting. Salah satu daripadanya ialah dari segi bahasa yang satu lagi dari segi peristilahan diskriminasi. Secara am izinkan saya menjawab bahawa pandangan Yang Berhormat berkaitan dengan penggunaan bahasa yang betul dan juga cara olahan sintaksis ataupun susunan bahasa itu perlu mengikut susunan yang diterima dan tidak lagi seperti yang dikritik oleh sesetengah pihak perlu diterima dengan baik dan saya ingat atas pantun burung murai dan sebagainya itu dalam pada demikian beliau menanyakan adakah diskriminasi yang disifatkan CEDAW itu merupakan sesuatu yang telah dikemaskinikan.

A Saya maklum tentang konvensyen tersebut dan Malaysia sebagai salah satu daripada anggota konvensyen CEDAW pada tahun 1995 memang akur kepada keputusan tersebut dan memasukkan perkataan "jantina" dalam Perkara 8(2) ini adalah sedekat-dekat mungkin bagi kita memberi penjelasan dan kesempurnaan kepada tuntutan CEDAW itu.
B

[19] Further at p. 70, the Minister said:

Tentang CEDAW sebentar tadi, biar saya bacakan sedikit petikan daripada The Convention on the Elimination of all forms of
C Discrimination Against Women. Atau secara ringkasnya The CEDAW Convention. Dia kata di sini, "Malaysia has become a party in 1995". Keadaan sedemikian juga Artikel menyatakan bahawa pihak-pihak yang berkenaan mempunyai tanggungjawab supaya menampilkan pandangan serta konsep bahawa wanita tidak didiskriminasikan. Atas tujuan itu kita telah berjaya pada hari ini
D dan yang Menteri Pembangunan Wanita dan Keluarga telah tiga kali menyebut peruntukan ini supaya kerajaan mengambil perhatian sekiranya pihak pembangkang merasa bahawa dengan keikhlasan Perdana Menteri mewujudkan kementerian ini ada faedahnya. Sekurang-kurangnya perkataan terima kasih dan penghargaan itu
E harus kita kemukakan kepada beliau. [Tepuk]

[20] The gist of the plaintiff's complaint is that the GSTT post was revoked and withdrawn by the defendants on the sole ground that the plaintiff was pregnant. The question here is whether this action of the defendants tantamounts to gender discrimination and
F therefore against art. 8(2) of the Federal Constitution?

[21] As has been stated earlier, the word "gender" was incorporated into art. 8(2) of the Federal Constitution in order to comply with Malaysia's obligation under the CEDAW. It is to
G reflect the view that women are not discriminated. Article 1 of CEDAW defines "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital
H status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

[22] Further, Article 11(1)(b) of CEDAW provides that state
I parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same

rights, in particular the right to the same employment opportunity, including the application of the same criteria for selection in matters of employment. In Article 11(2) (a) of CEDAW, it provides that State Parties shall take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds *inter alia*, of pregnancy.

[23] According to the Depository Notification dated 28 July 2010 by Malaysia, the only reservation on CEDAW now is confined to Article 9(2), 16(1)(a), 16(1)(f) and 16(1)(g). It also makes a declaration that in relation to art. 11 of the Convention, Malaysia interprets the provision of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only. Mr Andrew Khoo the learned counsel from Suhakam explains, that this is because there are some countries promoting what is called a third gender. Hence, the declaration does not detract at all from Malaysia's whole obligation on Article 11 of CEDAW.

[24] But the question now, can this court refer to CEDAW in clarifying the term "equality" and gender discrimination under art. 8(2) of the Federal Constitution? In *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 at p. 386, Siti Norma FCJ when discussed the application of Universal Declaration of Human Rights 1948 said as follows:

> In my opinion, the status and the weight to be given to the 1948 Declaration by our Courts have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. ... Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member states. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty, to which member states can ratify or accede to and those principles will then have the force of law.

[25] CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in *Mohamad Ezam*'s case *(supra)*, it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of

CEDAW as evidenced in the letter from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010.

[26] In 1988, there was a high level judicial colloquium on the Domestic Application of International Human Rights Norms (the Colloquium) in Bangalore, India. The Chief Justice of Malaysia at that time was one of the participants of the Colloquium. One of the outcomes of the Colloquium was the Bangalore Principles. It set out values and principles that judges should adhere to in carrying out their duties. Of particular relevance here is:

> Value 5: Equality
>
> Principle: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
>
> Application:
>
> 5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").
>
> 5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
>
> 5.3. A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

[27] The Convenor of the Colloquium summarized the discussions, *inter alia*, as follows:

> 7. It is within the property nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[28] Hence, it has become the obligation of this court to have regard to Malaysia's obligation under CEDAW in defining equality and gender discrimination under art. 8(2) of the Federal Constitution.

[29] In 2005, more commitments were made by Malaysia in the Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement. Among them were as follows:

4. Recognise the need for full and accelerated implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Convention:

…

16(m). Strengthen the incentive role of the public sector as employer to develop an environment that effectively affirms and empowers women;

16(p). Facilitate the creation of sustainable jobs and livelihood opportunities to improve women's position in the labour market and ensure favourable working conditions for all women, including migrant women, consistent with all their human rights;

…

43. Gender mainstreaming in all legislation, policies, and programmes is an essential process to women's empowerment and their full participation in all spheres of society. It facilitates the integration of women's differing experience and needs into the development process, as well into the society and helps to change the negative social norms that discriminate against women. NAM member states recognise that effective gender mainstreaming is critical to the empowerment of women and to the achievement of gender equality.

44. We hereby commit ourselves to:

a) Take all necessary measures, including in the area of law, policy, programme and activities to eliminate discrimination against women within public and private sectors;

b) Implement affirmative actions, where needed, to accelerate *de facto* equality rights of women in all spheres;

c) Raise awareness about women's right to equality and the importance of women's participation and representation in all spheres and at all levels in order to eliminate obstacles to women's equality.

[30] To me, in interpreting art. 8(2) of the Federal Constitution, it is the court's duty to take into account the Government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term "equality" and gender discrimination under art. 8(2) of the Federal Constitution.

[31] In Australia in the case of *Minister for Immigration and Ethnic Affairs v. Teoh* [1995] 128 ALR 353 Mason, CJ, speaking for himself and Deane, J, said:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (*Chow Hung Ching v. The King* [1948] 77 CLR 449; *Bradley v. The Commonwealth* [1973] 128 CLR 557; *Simsek v. Macphee Koowarta v. Bjelke-Peterson* [1982] 148 CLR 636; 40 ALR 61; *Kioa v. West* [1985] 159 CLR 550; *Dietrich v. The Queen* [1992] 177 CLR 292; *J.H. Rayner Ltd v. Department of Trade* [1990] 2 AC 418). This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. (*Simsek v. Macphee* [1982] 148 CLR, at 641-642). So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s. 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.

[32] But the fact that the Convention has not been incorporated into Australian Law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party (*Chu Kheng Lim v. Minister for Immigration* [1992] 176 CLR 1), at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligation under international law.

[33] It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law *(Polites v. The Commonwealth)*. A

[34] Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law ... B C

[35] But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the court have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials (*Lamb v. Cotogno* [1987] 164 CLR 1 at 11-12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law. D E F

[36] It is also pertinent that in India in the case of *Vishaka v. State of Rajasthan* AIR [1997] SC 3011, the court when interpreting the Indian Constitution had emphasized the obligation of the Indian Government in two other international statements: G

(a) the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, where the principles of the independence of the judiciary were accepted by the Chief Justice of India, and H

(b) Fourth World Conference on Women in Beijing where the Government of India had made an official commitment.

[37] In *Vishaka*'s case *(supra)*, *Teoh*'s case *(supra)* was applied. It must also be noted that Malaysia is also a party to the Beijing Statement and Fourth World Conference on Women in Beijing. I

[38] Article 26 of the Vienna Convention on the Law of Treaties 1969 provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. CEDAW is without doubt a treaty in force and Malaysia's commitment to CEDAW is strengthened when art. 8(2) of the Federal Constitution was amended to incorporate the provisions of CEDAW which is not part of the reservation, ie, to include non-discrimination based on gender. As such, I am of the opinion that there is no impediment for the court to refer to CEDAW in interpreting art. 8(2) of the Federal Constitution. Hence, applying art. 1 and 11 of CEDAW I hold that pregnancy in this case was a form of gender discrimination. The plaintiff should have been entitled to be employed as a GSTT even if she was pregnant. Further, the plaintiff was pregnant because of her gender. Discrimination on the basis of pregnancy is a form of gender discrimination because of the basic biological fact that only women have the capacity to become pregnant. Refer to the decision of the Supreme Court of Canada in *Brooks v. Canada Safeway Ltd* [1989] 59 DLR (4th) 321 where it was held as follows:

> It cannot be disputed that everyone in society benefits from procreation. The Safeway Plan, however, places one of the major costs of procreation entirely upon one group in society; pregnant women. Thus, in distinguishing pregnancy from all other health related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find that Safeway Plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway Plan is discriminatory furthers this purpose.

[39] It has been argued by the defendants that by applying the principle of reasonable classification, it is justified to discriminate pregnant women. However, with due respect, the principle of reasonable classification is only applicable to art. 8(1) and does not apply to art. 8(2) of the Federal Constitution. This is clearly explained in *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180 as follows:

Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in Article 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under Article 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by Article 8(1) (*Srinivase Aiyar v. Saraswathi Ammar* AIR [1952] Mad 193 195 at page 195; *Kathi Raning Rawat v. State of Saurashtra* AIR [1952] SC 123 at page 125).

[40] It has also been argued on behalf of the defendants that the decision not to employ a pregnant woman for GSTT is a policy consideration and the court ought not to review or question it. The defendants cite *inter alia* the cases of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, *C.C.S.U v. Minister of Civil Service* [1994] 3 All ER 935 and *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11. I totally agree that the court should not be involved in the policy decision of the government. However, in this instant case, the argument of policy consideration, to my mind, is an afterthought, as, if it is that important, why was this not incorporated into the circular or raised during interview as submitted by the learned counsel for the plaintiff? I would only accept that para. 4.22 of the circular is a policy consideration and the court therefore must not review it.

[41] It is very clear that the contract for GSTT is a month to month contract and it can be terminated at any time. Even after one month of working, there is no guarantee that the person will stay even if she is not pregnant. As such I find there is no merit in the argument put forward by the defendants that employing a pregnant woman to fill up the post will defeat the purpose of GSTT to solve the problem of shortage of teachers in Malaysia. Even medical check-up for pregnant women will not disturb the school time as it can be done in the evening or night.

[42] I also note, even the circular does not specifically prohibit a pregnant woman from applying for the post. It merely states that a GSTT is not entitled to maternity leave. If that is the case, is that not indirectly saying that pregnant women could apply only that they are not entitled to maternity leave? To me, that provision in the circular supports the argument that a pregnant woman can be engaged for GSTT.

[43] It is also the defendants' submission that based on the Federal Court's decision in the case of *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713, art. 8 of the Federal Constitution does not apply to a contractual relationship. With due respect, what was held in *Beatrice*'s case *(supra) inter alia*, is as follows:

> To invoke Article 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with contravention of individual rights by the Legislative or the Executive or its agencies. …

[44] By virtue of art. 160 of the Federal Constitution, the defendants are definitely public authorities and therefore agents of the Executive. To me, the defendants' act of revoking and withdrawing the Placement Memo because the plaintiff was pregnant constitute a violation of art. 8(2) of the Federal Constitution. It was the contravention of the plaintiff's rights by the defendants as agents of the Executive. As such, the requirement of *Beatrice*'s case has been fulfilled.

Conclusion

[45] The Supreme Court in *Teh Guan Teik v. Inspector General of Police & Anor* [1998] 3 CLJ 153 had quoted Lee Hun Hoe CJ in *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion. In my opinion, the court has a role to promote the observance of human rights in this country. On the grounds I have indicated above, the application must be allowed except for prayer 3. As this is a public interest case, I make no order as to costs.